Supreme Court, U. S.
FILED
JAN 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-1059

In the
Supreme Court of the United States

UNITED STATES OF AMERICA,
Respondent,

vs.

RAYMOND SAWYER,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdictional Statement	2
Questions Presented	2
Constitutional And Statutory Provisions Involved	3
Statement Of Facts	4
Reasons For Granting The Writ	9
I. Because Federal Rule Of Evidence 803(8) Represents The Exclusive Conduit Through Which Hearsay Public Records And Reports May Be Received As Evidence, An IRS Agent's Investigatory Report Should Not Have Been Admitted Under Federal Rule 803(5) And The Conviction, Based Primarily On That Report, Should Not Stand	10
II. Because The Jury Was Not Instructed That *Mens Rea* Is An Element Necessary To Establish The Offense Charged, As This Court's Decisions Clearly Hold, The Conviction Cannot Stand	16
Conclusion	18
Appendices	1a

Authorities Cited

Cases

Pointer v. Texas, 380 U.S. 400 (1964)	15
United States v. Bishop, 412 U.S. 346 (1972)	10, 16
United States v. Oates, 560 F.2d 45 (2d Cir. 1977)	9, 14

PAGE

United States v. Sawyer, ... F.2d ..... (7th Cir. 1979) 9

United States v. Smith, 521 F.2d 957 (C.A.D.C. 1975) 12, 15

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Constitution; Amendment 6 ..... 2, 9

28 U.S.C. § 1254(1) 2

26 U.S.C. § 7203 ..... 2, 3, 5, 16

Federal Rule Of Evidence 801(c) 3, 12

Federal Rule Of Evidence 803(5) 3, 9, 11, 14

Federal Rule Of Evidence 803(6) 4, 12, 14

Federal Rule Of Evidence 803(8) 4, 9, 11, 12, 14, 15

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No.

UNITED STATES OF AMERICA,

Respondent,

vs.

RAYMOND SAWYER,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, rendered in the above-entitled cause on August 16, 1979.

CITATIONS TO THE OPINIONS BELOW

The above-entitled cause was originally brought in the United States District Court for the Northern District of Illinois, Eastern Division. The trial was held before a Jury, which, on July 18, 1978, found the defendant guilty. No opinion was issued. The decision of the Seventh Circuit Court of Appeals, affirming the conviction, is not yet reported. The jury verdict and the decision of the Seventh Circuit are reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The jury verdict was rendered on July 18, 1978. A timely motion for a new trial was made on July 27, 1978. The motion was denied and final judgment of conviction entered on August 21, 1978. The following day, August 22, 1978, the defendant filed notice of appeal. Oral argument was held on April 12, 1979, and the Court of Appeals decision was announced on August 16, 1979. The defendant timely petitioned for rehearing, which was denied on December 6, 1979. Pursuant to a further motion of the petitioner herein, an order was entered staying the mandate on December 21, 1979.

This Petition for Certiorari has been filed within thirty days of the denial of rehearing, in accordance with Supreme Court Rule 22(2). Jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

I. Whether Federal Rule of Evidence 803(8) represents an exclusive conduit through which hearsay public records and reports can be admitted as evidence.

II. Whether a defendant to a charge brought under 26 USC §7203 is entitled to have the jury instructed that *mens rea* is an element necessary to establish the offense.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 6:

> Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

> of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 U.S.C. §7203:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. (Aug. 16,

Federal Rule of Evidence 801(c):

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Federal Rule of Evidence 803(5):

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Federal Rule of Evidence 803(6):

> Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Federal Rule of Evidence 803(8):

> Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

STATEMENT OF FACTS

Raymond Sawyer, the defendant, resides with his wife and three daughters in Winnetka, Illinois. He is an accountant in private practice who specializes in personal

and real property tax assessments. Although he has, from time to time, prepared simple income tax returns, he is not a CPA.

In April, 1978, Sawyer was indicted by information on two counts of violations, of 26 U.S.C. §7203, for failure timely to file his tax returns for the years 1971 and 1972. Sawyer's defense at trial was that his failure to file owed to his diminished capacity, stemming from a greatly impaired physical condition and his resultant deep-seated apprehension of impending death. Such diminished capacity, Sawyer argued, rendered him incapable of forming the necessary *mens rea* willfully to neglect his tax returns.

The evidence taken at trial established the nature and history of Sawyer's illness. In the beginning of 1970, Mr. Sawyer noticed that he was suffering from hematuria. He saw Dr. Wald who referred the defendant to Dr. John Graham, a urologist affiliated with Evanston Hospital. Dr. Graham, in turn, recommended that Mr. Sawyer have a cystoscope taken (*i.e.*, an X-ray of his kidneys, bladder and urinary tract); subsequently, Dr. Wald informed the defendant that the cystoscope failed to disclose the source of his bleeding. Sawyer's bleeding progressively worsened, and he became concerned that such bleeding was a symptom of cancer.

Mr. Sawyer then talked with Dr. Alfano, an opthalmologist on the faculty of Northwestern University, and personally acquainted with Mr. Sawyer for years, who acknowledged the seriousness of hematuria and recommended that Mr. Sawyer make an appointment to see Dr. Grayback, head of urology at Passavant Hospital.

The defendant saw Dr. Kropp, an associate of Dr. Grayback, and Dr. Kropp reported to Dr. Alfano that he

thought Sawyer was suffering from nephritis (*i.e.*, 'inflammation of the kidney affecting the structure . . . being acute or chronic, and caused by infection, degenerative process, or vascular disease. . .').

When Mr. Sawyer learned of Dr. Kropp's diagnosis, his anxiety increased, since he recalled that a friend of his had suffered from nephritis while still in high school and had died of this disease five or six years later.

In early 1971, Mr. Sawyer returned to Dr. Kropp, who gave him a urinalysis and blood test. Dr. Kropp recommended that Mr. Sawyer see Dr. Lewis and have X-rays of his kidney and urinary tract taken.

Dr. Lewis took such X-rays some time in 1971, but they were of no avail in ascertaining the source of the difficulty.

The defendant testified that throughout 1971 he had suffered from frequent bleeding and also an ache in the middle of his back, causing him to be chronically depressed. Sawyer visited a psychiatrist on a number of occasions during the first months of 1972, but the sessions did not help improve his state of mind.

Once again he went to see Dr. Kropp, who referred Mr. Sawyer to Dr. Simon of Passavant Hospital, a specialist in kidney and urology problems. When Dr. Simon recommended that Mr. Sawyer undergo a biopsy of the kidney, the defendant became convinced that he had cancer. Dr. Alfano informed Mr. Sawyer that he should not under any circumstances have a biopsy of his kidneys taken, since a biopsy would leave permanent damage.

About this time, at the end of 1972, Mr. Sawyer also began bleeding rectally. The defendant told his wife he

thought he was dying and so had taken a partner into his business and had told his brother-in-law, an attorney, to look after his family if anything happened to him. Because of his obsession with his disease and enervating apprehension of death, the defendant found it impossible to sit down to work for the days that it would require to organize his records so as to have his joint income tax prepared for the year 1971. Therefore, the defendant applied for three successive extensions of time to file his 1971 return with the explanation in each: "Due to internal bleeding, taxpayer has not had time to care for his business and personal responsibilities." The Internal Revenue Service granted his first two requests, but denied the third on October 15, 1972, with the explanation that only if the taxpayer was out of the United States would the Service grant him an extension for longer than six months.

By 1974, Sawyer was convinced that he could no longer live in such a state of anxiety and consulted a Dr. Sparberg, who referred him to Dr. Lewis, the same radiologist he had seen twice before, for X-rays. Some four years after he had initially noticed blood in his urine, during all of which time his bleeding had continued and increased, and during all of which time the numerous physicians consulted were unable correctly to diagnose the cause of his discomfort, Dr. Lewis' X-rays revealed that Sawyer had a kidney stone. Sawyer was elated to learn his problem to be no more than that.

His emotional crisis now at an end, and his physical difficulties soon to be resolved, Sawyer, on March 7, 1974, called a CPA, Robert Larkin, to arrange to have him prepare his tax returns for the years 1971 and 1972 (Tr. 112-13).

The night of March 7 and continuously through March 10 Sawyer worked steadily at compiling his records in order to present them to Larkin. On Monday, March 11, Sawyer brought all of these papers to Larkin, who prepared Sawyer's returns that day. Sawyer mailed them that evening. Even though Sawyer's state of mind was the only real issue to be decided, the jury was not allowed to hear evidence that the admittedly tardy preparation of the 1971 and 1972 tax returns was coincidental with the end of his mental and physical crisis.

REASONS FOR GRANTING THE WRIT

The question of whether Federal Rule of Evidence (FRE) 803(8) represents an exclusive conduit through which hearsay public records and reports, particularly reports by police or other investigatory authorities, may be received as evidence is a novel and substantial question not yet presented to this Court. Resolution of the issue will have great impact upon the conduct of criminal trials in federal courts, so long as the Federal Rules of Evidence govern those trials. The circuits have divided as to whether a report not admissible under FRE 803(8) may be received under the exception in FRE 803(5). [*United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977), holding that 803(8) is exclusive; *United States* v. *Sawyer*, ... F.2d ..... (7th Cir. 1979), holding that 803(5) may be utilized in the alternative.] Petitioner herein contends that the plain language of FRE 803(8), and the Congressional purpose in enacting it compel the conclusion that the rule was intended as an exclusive exception to the hearsay doctrine in the case of public records and reports, and that a contrary conclusion would defeat utterly the intentions of those who promulgated that rule. Petitioner further contends that to allow data from investigative reports to be admitted under 803(5) will effect an erosion of rights guaranteed by the Confrontation Clause of the Sixth Amendment to the Constitution.

The second question presented, whether or not *mens rea* is an element of a "willful" failure timely to file income tax returns, and whether or not the jury was properly so instructed in this case, can hardly be considered novel.

This Court has often considered the question, and has explicitly held in *United States* v. *Bishop,* 412 U.S. 346 (1972) that "willfully" as used in criminal statutes of the Internal Revenue Code, had been consistently interpreted as requiring an element of *mens rea.* The Petitioner herein asserts that the instructions to the jury failed adequately to relate this necessary element, and that his conviction therefore cannot stand.

I.

BECAUSE FEDERAL RULE OF EVIDENCE 803(8) REPRESENTS THE EXCLUSIVE CONDUIT THROUGH WHICH HEARSAY PUBLIC RECORDS AND REPORTS MAY BE RECEIVED AS EVIDENCE, AN IRS AGENT'S INVESTIGATORY REPORT SHOULD NOT HAVE BEEN ADMITTED UNDER FEDERAL RULE 803(5) AND THE CONVICTION, BASED PRIMARILY ON THAT REPORT, SHOULD NOT STAND.

Because the defendant stipulated that he had income for the years 1971 and 1972, the only issue for the jury to decide at this trial was whether the defendant's failure to file his returns when they were due for the years 1971 and 1972 was "willful" as required for convictions. The only evidence that the prosecution presented in its case in chief concerning the defendant's willfulness was the testimony of former Internal Revenue Service agent Wayne Schroeder. Schroeder, over the persistent and timely objections of defense counsel, was allowed to testify regarding an alleged telephone conversation that he had had in September of 1973 with the defendant taxpayer during which Sawyer is alleged to have stated that his returns for 1971 and 1972 had been filed. Sawyer denies that such conversation took place.

Schroeder, at the time of his testimony, had no independent recollection concerning his alleged conversation with Sawyer, nor after reviewing the file was his recollection refreshed. The record of that conversation was in a referral report which had been prepared by Schroeder approximately four months after the alleged conversation. Schroeder testified that the referral report would have been prepared from a history sheet compiled during the pendency of the investigation. The history sheet, upon which Schroeder stated that events were recorded, allegedly contemporaneously was destroyed, in accordance with IRS policy. At the trial, Schroeder read from the referral report, which he remembered nothing about preparing.

The Court of Appeals ruled that "Congress intended to bar the use of law enforcement reports as a substitute for the testimony of the officer," and that 803(8) did not disqualify the recorded recollection of a testifying officer "when such recollections would otherwise be admissible under Rule 803(5)." Thus, the Court of Appeals, apparently conceding that the referral report was not within the exception provided by 803(8), allowed the prosecutor to sneak in through the window what he could not get through the door. A fair reading of FRE 803(8), and consideration of the intentions of the Congress which promulgated that rule compel a contrary result. Petitioner in fact contends that the testimony given by former agent Schroeder should not have been admitted under either exception to the hearsay rule.

The statement read by agent Schroeder was unquestionably an out of court statement offered for the truth of the matter asserted, and thus was hearsay as defined

in FRE 801(c). That statement, then, is inadmissible unless it qualifies under an exception to the hearsay doctrine set out in the Federal Rules.

The hearsay exceptions enumerated in Rule 803, wherein the availability of the declarant to testify is immaterial, are, for the most part, an affirmation of well-recognized common law exceptions to the hearsay doctrine, exceptions which come to be accepted because of the reliability inherent in such forms of testimony. Governmental reports and records were, under the common law rules, admitted under the "business records" exception [now codified as FRE 803(6)]. See *United States* v. *Smith,* 521 F.2d 957 (D.C.Cir. 1975), at 963, citing cases decided in five circuits where police records were admitted under the "business records" exception, all prior to the adoption of the Federal Rules of Evidence. Thus, when the Congress enacted FRE 803(8), it was in effect codifying a recognized exception to the hearsay rule.

The rules drafted by the Court and sent to Congress included the following draft of 803(8):

> (8) *Public Records and Reports.*—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law or (C) in civil cases and again the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

The house judiciary committee approved this version without substantive change, but with the stated intention

that the phrase "factual findings" be strictly construed. House Report on the Federal Rules of Evidence, p. 14. However, during debate on the rules in the House, serious objections were raised to the rule as reported from the Judiciary Committee and amendments were incorporated which altered both the common law rule and the rule voted out by the judiciary committee, narrowing the scope of the exception in criminal cases. Representative Holtzman, who had expressed consistently a concern that evidence in the form of government reports could be admitted without a criminal defendant having any effective right of cross-examination, offered an amendment which was adopted, restricting the exception on matters observed to matters "as to which . . . there was a duty to report." The clear intent of such an amendment was to narrow the parameters of the exception in 803(8).

A second amendment of great significance to the issue brought before the Court in this petition was offered by Representative Dennis, who also had served on the Judiciary Committee. This amendment further narrowed the hearsay exception to exclude "in criminal cases matters observed by police officers and other law enforcement personnel." The Dennis amendment was adopted; the rule as enacted contains both the narrowing amendments, clearly designed to limit the use of hearsay testimony against defendants in criminal cases. Debate on each of the amendments evidenced great concern as to the right of cross-examination, a worthless right when the testimony to be challenged is a document, and a concensus of Congress that admission of police reports should not, in criminal cases, be allowed. Congressional Record, pp. 563-565.

Thus, it is self-evident that Congress intended, by adopting the Dennis Amendment to FRE 803(8), that in criminal cases hearsay reports of matters observed by law enforcement personnel would *never* be admitted. Such, by design, was a protection Congress desired to afford defendants in criminal cases. To allow, as did the trial court and Court of Appeals, below, the admission of such testimony under a different exception, does violence to the intent of congress, contradicts the plain words of FRE 803(8) and makes rules 803(5) and 803(8) obnoxious to each other. Such was the conclusion reached in *United States* v. *Oates,* 560 F.2d 45 (2d Cir. 1977). A holding by this Court that the limitation, imposed by Congress upon the hearsay exception of FRE 803(8) specially will resolve a split of the circuits, affirm Congressional intent, and will render inadmissible the only evidence heard at trial against petitioner Sawyer on the issue of *mens rea.*

Petitioner Sawyer additionally contends that the evidence read at trial by agent Schroeder was not within the 803(5) exception in any event. That exception provides that the record from which the witness reads must have been "made or adopted by the witness when the matter was fresh in his memory. . . ." Agent Schroeder read from a document prepared some four months after his alleged conversation with Sawyer, and at a time when he had no recollection at all of the conversation. The agent's testimony, then, was hearsay upon hearsay. FRE 803(5) cannot seriously be thought to comprehend the admission of such testimony.

Nor should the agent's testimony be admitted under exception 803(6), the so-called "Business Records" exception. Although police records were, before the adoption

of the Federal Rules of Evidence, regularly admitted under the Business Records Act (now repealed, formerly 28 U.S.C. §1732), and in one case, *United States* v. *Smith,* 521 F.2d 957 (C.A. D.C. 1975), were admitted for use *against* the government in a criminal prosecution, a correct reading of FRE 803(8) reveals that rule to be the sole conduit through which police records should be received in evidence.

Although petitioner Sawyer feels that it is unnecessary to reach any constitutional questions in this case, it is well to note that the interpretation of the Federal Rules of Evidence given by the Seventh Circuit below, finding as that tribunal did that records as to which no cross-examination would be possible should be read before the jury, and so finding in the face of a clear Congressional madate to the contrary, places those rules in tension with the Confrontation Clause of the Sixth Amendment to the Constitution. This Court has been zealous in protecting the right of defendants in criminal cases to cross-examine witnesses against them. In the seminal case of *Pointer* v. *Texas,* 380 U.S. 400 (1964), the Court said: "There are few subjects, perhaps, on which this Court and other Courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." 380 U.S. at 405. As has been shown, FRE 803(8), as written and amended, had as a major purpose the protection of the right to cross-examine and confront adverse witnesses. Such a dimunition of those rights as would be effected if the decision of the Seventh Circuit below is accepted cannot

be reconciled with this Court's past decisions. For this, and all the reasons cited before, the decision to admit the testimony of agent Schroeder must be reversed.

II.

BECAUSE THE JURY WAS NOT INSTRUCTED THAT MENS REA IS AN ELEMENT NECESSARY TO ESTABLISH THE OFFENSE CHARGED, AS THIS COURT'S DECISIONS CLEARLY HOLD, THE CONVICTION CANNOT STAND.

Petitioner Sawyer was indicted on two counts under 26 U.S.C. §1703 for "willfully" failing to file his tax returns for the years 1971 and 1972. On the issue of whether Sawyer's failure to file had been willful, the trial judge instructed the jury as follows:

> As used in the statute . . . the word "willful" . . . means voluntarily and purposeful and deliberate and intentional *as distinguished from* accidental, inadvertent, a negligent. Government Instruction no. 32 (emphasis supplied).

The given instruction ignores, in the face of a long time of decisions by this Court, the element of *mens rea,* and should not be sustained.

In *United States* v. *Bishop,* 412 U.S. 346 (1972), the case history of the elements needed for a "willful" violation of the tax statutes was covered at some length. In that opinion, it was said that:

> The Court, in fact, has recognized that the word "willfully" in these [tax] statutes generally annotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of willfullness as "bad faith or evil intent" *United States* v. *Murdock,* 290 U.S. [389] at 398, or "evil circumstances

> of the taxpayer, *United States* v. *Spies,* 317 U.S. [492; 1942] at 498. . . . It is not the purpose of the system to penalize . . . innocent errors made despite the exercise of reasonable care. . . . The Court's *consistent interpretation* of the word "willfully" to require an element of *mens rea* implements the pervasive intent of Congress to construct penalties that separate the *purposeful* tax violation from the well meaning but easily confused mass of taxpayers. 412 U.S. at 360, 361.

Clearly, it is essential, in order to make out a willful violation of the tax statutes, that the government prove that violation to have been voluntary, purposeful, intentional, deliberate, and with *evil motive.* The charge to the jury in Sawyer's case neglected the latter element, and in so doing was utterly prejudicial to Sawyer, who pleaded his diminished capacity as a defense. He did not claim that his failure to pay was the result of accident, inadvertence, or negligence, the grounds for exculpation given the jury, but that his state of mind and, consequently, which rendered him *incapable* of tending properly to his affairs, and, consequently without the "evil motive" necessary to establish the offense. Diminished capacity if satisfactorily proven, has long been recognized as a defense to any crime requiring *mens rea* for its commission. By failing to instruct the jury as to Sawyer's legitimate, well-leaded, and *only* defense, the trial judge effectively removed the case from the jury. As such, the ensuing conviction, which was the only result possible under the instruction as given, cannot stand.

CONCLUSION

For all of the reasons set out above, the petitioner respectfully requests that a Writ of Certiorari should issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

No. 78CR253

UNITED STATES OF AMERICA,

vs.

RAYMOND SAWYER,

VERDICT
Filed July 18, 1978

We, the Jury, find the defendant Raymond Sawyer guilty as charged in the indictment.

/s/ Henry L. Payne
Foreman
/s/ Edward O. Topor
/s/ Katherine Evans
/s/ Frances D. French
/s/ Micheal D. Henderson
/s/ Marlene Price
/s/ Raymond Nelson
/s/ Anne A. Fairbrother
/s/ Marilyn Krenter
/s/ Thomas Tuley
/s/ Arthur W. Weil
/s/ Joe Loveleor

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 78-2098

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAYMOND SAWYER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-Cr-253—BERNARD M. DECKER, *Judge*.

ARGUED APRIL 12, 1979—DECIDED AUGUST 16, 1979

Before CASTLE, *Senior Circuit Judge*, SWYGERT and BAUER, *Circuit Judges*.

BAUER, *Circuit Judge*. The appellant Raymond Sawyer was indicted by information on two counts of violating 18 U.S.C. § 7203 by failing to file timely income tax returns for the calendar years 1971 and 1972. Sawyer pleaded not guilty to the charges, but was found guilty by a jury. The court sentenced him to a one-year term of imprisonment on each count, with the sentences to run concurrently; in addition, the court fined Sawyer $10,000 on Count I. Sawyer now appeals.

In his first argument on appeal, Sawyer claims that the jury was improperly instructed on the meaning of "willful" as used in 26 U.S.C. § 7203. The court instructed the jury as follows:

> As used in the statute . . . the word "willful" means voluntarily and purposely and deliberate and intentional as distinguished from accidental, inadvertent or negligent.
>
> Now, the failure to do an act is willfully done if it is done voluntarily and purposely and with a specific intent to fail to do what the law requires to be done; that is to say, with a bad purpose to disobey and disregard the law . . . .

In essence, Sawyer argues that the jury should have been instructed that his failure to file was not "willful" if it resulted from an "innocent reason" or "justifiable excuse." The omission of this language, Sawyer maintains, prevented the jury from considering his only defense, namely, that his physical and emotional condition rendered him incapable of filing his income tax returns on time.

However, in an *en banc* decision, this Court approved a jury instruction on "willfulness" that is virtually identical to the one given in this case. *United States* v. *McCorkle*, 511 F.2d 482, 484 n.2 (7th Cir. 1975), *cert denied*, 423 U.S. 826 (1975). Like Sawyer, McCorkle argued that the instructions "had the effect of eliminating justifiable excuse as a consideration in resolving the issue of willfulness." *Id.* at 486. In rejecting the claim, the Court noted that only a limited set of circumstances could legally justify a failure to file— namely, "an inadvertent failure to file or a bona fide misunderstanding as to [defendant's] . . . duty to make a return." The Court then reasoned that "[s]ince the instructions required the jury to find an intentional violation of a known legal duty, it would have been essential for the jury to conclude that McCorkle's conduct was unjustified." *Id.* Finding this logic applicable to the case at hand, we hold that the trial court did not commit reversible error in its instructions to the jury on the meaning of "willfulness."

Sawyer next challenges the trial court's instruction to the jury on false exculpatory statements. That instruction read:

> Now, evidence has been introduced that the defendant made certain exculpatory statements, which were outside the courtroom, when he was interviewed, explaining his actions to show that he was innocent of the crime charged in an [sic] information. Now, evidence contradictory [sic] such statements has also been introduced and if you find that the exculpatory statements were untrue and that the defendant made them voluntarily and with knowledge of their falsity, you may consider such statements as circumstantial evidence of the defendant's consciousness of guilt.

This Court has recognized that a defendant's false, out-of-court exculpatory statements may be taken as evidence of guilt. *See, e.g., United States* v. *Riso,* 405 F.2d 134, 138 (7th Cir. 1968); *United States* v. *Lomprez,* 472 F.2d 860, 863 (7th Cir. 1972). The appellant argues, however, that the instruction did not require the jury to determine that he did in fact make the alleged statements. We are not persuaded by this claim, for, in our view, such a requirement is implicit in the language of the instruction, particularly since the appellant argued the issue to the jury. We thus find no grounds for reversal in the trial court's instruction on exculpatory statements.

The appellant next argues that the district court improperly admitted evidence of an alleged phone conversation between Sawyer and Revenue Officer Schroeder. It is Sawyer's position that the conversation was not properly authenticated and that a memorandum which Schroeder prepared on the conversation was inadmissible hearsay.

On the issue of authentication, there is sufficient circumstantial evidence, in our view, to satisfy Rule 901(6) of the Federal Rules of Evidence, for it is undisputed that the number listed in the agent's report was Sawyer's

business number, and the personal nature of the information sought makes it highly unlikely that anyone else would have answered for Sawyer.

The admissibility of the agent's report, however, raises a more difficult issue. It would seem, as the government argues, that the report satisfies the criteria for admissibility as a recorded recollection under F.R.Ev. 803(5). The agent testified that he no longer had a recollection of the conversation and that the history sheet was prepared immediately after the conversation. In addition, the agent's testimony tended to show that both the original notation and its later transcription to the referral report were accurate.

Nevertheless, Sawyer claims that the referral report should have been excluded because it represents the report of a law enforcement officer. Relying heavily on *United States* v. *Oates,* 560 F.2d 45 (2n Cir. 1977), Sawyer argues that law enforcement reports that are barred under the "public records" exception of F.R.Ev. 803(8) are also inadmissible under any other exception to the hearsay rule. In *Oates,* the Second Circuit found "a clear congressional intent that reports not qualifying under F.R.Ev. 803(8)(B) or (C) should, and would, be inadmissible against defendants in criminal cases." 560 F.2d at 72.

We are not persuaded, however, that the restrictions of Rule 803(8) were intended to apply to recorded recollections of a *testifying* law enforcement officer that would otherwise be admissible under Rule 803(5). In our view, the legislative history of Rules 803(8)(B) and (C) indicates that Congress intended to bar the use of law enforcement reports as a substitute for the testimony of the officer. Thus, Representative Dennis, in offering the amendment which excluded law enforcement reports from admission at criminal trials, stated:

> What I am saying here is that in a criminal case, . . . we should not be able to put in the police report to prove your case without calling policeman. I think

> in a criminal case you ought to have to call the policeman on the beat and give the defendant the chance to cross examine him, rather than just reading the report into evidence. That is the purpose of this amendment.

120 Cong. Rec. H 564 (Feb. 6, 1974). And the *Oates* court itself identified the loss of confrontation rights as the underlying rationale for Rule 803(8):

> [The] pervasive fear of the draftsmen and of Congress that interference with an accused's right to confrontation would occur was the reason why in criminal cases evaluative reports of government agencies and law enforcement reports were expressly denied the benefit to which they might otherwise be entitled under F.R.Ev. 803(8).

560 F.2d at 78. We therefore decline to hold that Rule 803(8) disqualifies the recorded recollections of a testifying law enforcement officer, when such recollections would otherwise be admissible under Rule 803(5). Accordingly, since the hearsay declarant in this case was available for cross-examination, and since the referral report would otherwise qualify as a recorded recollection, we find no reversible error in the admission of the report.

Finally, Sawyer claims that the trial court erred in excluding proof that he had eventually paid his taxes for 1971 and 1972. However, as this Court noted in *United States* v. *Ming,* 466 F.2d 1000, 1005 (7th Cir. 1972), "[i]t has been clearly established that late filing and late tax payment are immaterial on the issue of willfulness in a Section 7203 prosecution." We see no merit in the appellant's argument that this principle is somehow inapplicable to the case at hand because the government was allowed to prove the amount of taxes that Sawyer owed for 1971 and 1972.

We have examined the appellant's other arguments and find no grounds for reversal. The judgment of the district court is therefore AFFIRMED.

SWYGERT, *Circuit Judge,* concurring in the result. With some reluctance, I concur in the affirmance of defendant's conviction. My reluctance stems from the admission of Revenue Officer Schroeder's reading from his referral report dated January 14, 1974 which stated that "a phone call was made to the taxpayer's husband who stated that the 1040 returns . . . 1971 and 1972 had been filed."

An examination of the referral report shows that it comes within the literal definition of records excluded pursuant to section 803(8)(B) of the Federal Rules of Evidence: "[M]atters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel.*" (emphasis added).

The problem here is whether section 803(8)(B) is inapplicable because of the operative effect of section 803(5) which reads in its entirety:

> *Recorded recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Officer Schroeder testified that he obtained defendant's telephone number from defendant's wife in September 1973 and that it was his routine practice to attempt to contact a taxpayer under investigation by telephone in such circumstances. He further testified that it also was routine to record all taxpayer contacts on a history sheet and that notations reflecting phone calls would be made immediately after the calls were completed.

Officer Schroeder said that he had no independent recollection of his phone conversation with defendant and that the history sheet on defendant had been destroyed after he had closed his part of the investigation. He testified that he had used the history sheet to prepare his referral report—the disputed document.

Although we are dealing with a record of a record, not made contemporaneously with the event, and in a sense double hearsay, I am satisfied that the requirements of section 803(5) were met. Because Schroeder was available as a witness for both foundation purposes and cross-examination, the hearsay was admissible under the Federal Rules of Evidence and the defendant was not deprived of the right of confrontation. If Officer Schroeder had not been available for cross-examination, defendant's right of confrontation would have been violated and a different result would have been compelled. *See United States* v. *Oates,* 560 F.2d 45 (2d Cir. 1977).

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 6, 1979

Before

Hon. LATHAM CASTLE, *Senior Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

No. 78-2098

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RAYMOND SAWYER,

Defendant-Appellant.

On Petition for Rehearing

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by Defendant-Appellant Raymond Sawyer, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 21, 1979

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. .....
Hon. .....

No. 78-2098

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

RAYMOND SAWYER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division
No. 78-CR-253
Judge BERNARD M. DECKER

This matter comes before the court on the "MOTION TO RECALL THE MANDATE" filed herein on December 18, 1979 by counsel for the defendant-appellant. This court being fully advised of the circumstances of this matter,

IT IS ORDERED that the mandate of this court, previously issued on December 14, 1979, is hereby RECALLED and STAYED until January 21, 1980. The clerk of the district court is hereby directed to retain the record of this appeal, unless directed otherwise by further order of this court.

Supreme Court, U. S.
FILED
FEB 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1059

In the Supreme Court of the United States

OCTOBER TERM, 1979

RAYMOND SAWYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1059

RAYMOND SAWYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for failure to file income tax returns, contending that the trial court erred in admitting a government agent's report into evidence and in instructing the jury with respect to willfulness.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of failing to file timely income tax returns for 1971 and 1972, in violation of 26 U.S.C. 7203. The trial court sentenced him to concurrent one-year terms of imprisonment on each count. He was also fined $10,000 on the first count. The court of appeals affirmed (Pet. App. 2a-8a).

The pertinent facts may be summarized as follows: Petitioner is an accountant who had gross income of $63,918.84 in 1971 and $73,955 in 1972 (Govt. Ex. S-2; Tr. 43-44, 83).[1] He did not file timely income tax returns for those years and sought to excuse his actions by testifying that his failure to file was due "to his diminished capacity, stemming from a greatly impaired physical condition and his resultant deep-seated apprehension of impending death" (Pet. 5). This incapacitation allegedly ended in 1974 when petitioner's condition was diagnosed as a kidney stone by Drs. Sparberg and Lewis (Pet. 7-8). Petitioner's explanation, however, was refuted by evidence that his kidney stone was diagnosed by Drs. Sparberg and Lewis in 1971, and not in 1974 (Govt. Ex. S-1; Tr. 267, 270, 284). It was also contradicted by the testimony of another physician (Dr. Wendel) that, as of November 3, 1972, petitioner was able to play handball, squash, and paddleball without undue discomfort from a kidney disorder; by Dr. Sparberg's testimony that petitioner came to him on February 22, 1974, complaining, *inter alia*, of "tennis elblow"; and by the fact that for the year 1972, when he claimed to be incapacitated by his "deep-seated apprehension of impending death" (Pet. 5), petitioner claimed a deduction of $7,194 for business entertainment. There was, in short, substantial evidence from which a jury could have reasonably concluded that petitioner was overstating both his physical discomfort and his fears of death.

There was further evidence that in a telephone conversation with Revenue Agent Schroeder, petitioner had falsely claimed that he had filed income tax returns for 1971 and 1972 (Tr. 52-53, 66). The evidence was

[1] "Govt. Ex." refers to the exhibits introduced into evidence at trial by the government. "Tr." refers to the trial transcript.

embodied in the agent's referral report. Although the agent testified that he no longer remembered the telephone conversation, he had made notes of the conversation at the time it occurred and then incorporated those notes in his referral report, after which the notes were destroyed. The referral report was read into evidence as a past recollection recorded, pursuant to Fed. R. Evid. 803(5).

1. Petitioner claims (Pet. 10-16) that the trial court erred in allowing the agent's referral report into evidence as past recollection recorded even though the terms of Rule 803(5) were met. In support of this contention, petitioner relies on *United States* v. *Oates*, 560 F. 2d 45 (2d Cir. 1977), for the proposition that law enforcement reports that cannot qualify under the public records exception to the hearsay evidence rule (Fed. R. Evid. 803(8)(B) and (C)) may not be admitted under any other exception to the rule against hearsay evidence (Rule 802). Accord: *United States* v. *Ruffin*, 575 F. 2d 346, 356 (2d Cir. 1978); *United States* v. *Quinto*, 582 F. 2d 224, 235 (2d Cir. 1978). But as the court of appeals pointed out, *Oates* identified the loss of confrontation rights as the underlying rationale of Rule 803(8).

Congress wished to preclude the government from using a law enforcement officer's report as evidence against an accused without making the officer available for cross-examination. Here, however, that rationale does not apply because Agent Schroeder was available for cross-examination (see Pet. App. 6a, 8a). But cf. *United States* v. *Cepeda Penes*, 577 F. 2d 754, 761 (1st Cir. 1978). At all events, given the overwhelming evidence that petitioner had acted willfully in failing to file his tax returns (see page 2, *supra*), the admission of the revenue agent's referral report was at most harmless error.

2. Petitioner further argues (Pet. 16-17) that the trial court's jury instruction on willfulness was fatally defective because it did not advise that willfulness required an "evil motive." But in *United States* v. *Pomponio*, 429 U.S. 10, 11-13 (1976), this Court rejected the same contention. Indeed, the instruction given in this case was "virtually identical" (Pet. App. 3a) to the one contained in *United States* v. *McCorkle*, 511 F. 2d 482 (7th Cir.) (en banc), cert. denied, 423 U.S. 826 (1975), which this Court cited with approval in *Pomponio* (429 U.S. at 13).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

DOJ-1980-02